No. 94-1554

Supreme Court, U.S.
FILED
APR 19 1995
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In The

Supreme Court of the United States

October Term, 1994

ABBOTT LABORATORIES, et al.,

v. *Petitioners,*

F. DAVID SEINFELD, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Dated: April 19, 1995

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PARTIES TO THE PROCEEDING

In addition to the parties to the proceeding who were identified by petitioners, Leatrice Seinfeld and Frederick Seinfeld were also plaintiffs in the district court and appellants in the court of appeals below, and are also respondents on the petition for writ of *certiorari*.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

F. David Seinfeld, Leatrice Seinfeld, Frederick Seinfeld, Steven Robinson, Joseph Seplow, and Beth Margolis, by their attorneys, hereby respond to the petition in this case for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Seventh Circuit.

STATEMENT OF THE CASE

In May and June of 1994, four sets of shareholders of Abbott Laboratories, Inc. (sometimes referenced herein as "Abbott" or the "Corporation"), an Illinois corporation,

brought four separate shareholder derivative actions against certain officers and directors of Abbott (and nominally against Abbott) in the Circuit Court of Cook County, Illinois. (App. 17, 30, 35, 43)[1] The shareholders who brought suit (sometimes referenced herein as "plaintiffs") are the respondents herein. The defendants in the shareholder derivative suits (sometimes referenced herein as "defendants") are the petitioners herein.

While the four sets of plaintiffs made somewhat different allegations in their respective complaints, each alleged that defendants had participated, or had allowed Abbott to participate, in certain misconduct with respect to Abbott's sales of infant formula. The plaintiffs alleged, *inter alia*, that Abbott, a leader in the sale of infant formula, had attempted to restrict advertising of infant formula products by new entrants in the infant formula market. (App. 23, 32, 39, 47) Certain of the plaintiffs also alleged that Abbott had duped the American Academy of Pediatricians into participating in this attempt to restrict the advertisement of infant formula. (App. 24, 39, 48) All of the plaintiffs alleged that, as a result of the misconduct perpetrated or allowed by defendants, Abbott had been sued for violations of the federal antitrust laws and on other grounds, and had settled certain of those suits by paying more than $140,000,000 in settlement amounts. (App. 23, 34, 40 49-50) The plaintiffs further alleged that there were other claims still pending against Abbott for its misconduct in connection with the sale of infant formula. (App. 24-25, 32-33, 40, 49)

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[1] References to petitioners' appendix are in the form "(App. ___)".

Each of the suits filed by respondents was brought in a one-count complaint for breach of fiduciary duty under Illinois common law. (App. 17, 30, 35, 43) Each complaint alleged that defendants had known, or should have known (in the performance of defendants' duties), of the wrongful conduct being perpetrated by agents of Abbott, but had failed to stop such wrongful conduct. (App. 25-26, 33, 40, 51) Plaintiffs claimed that, as a result of defendants' breaches of fiduciary duties, Abbott was injured by, among other things, having to pay the $140,000,000 to settle a number of the federal suits that had been filed against it.

On June 24, 1994, Abbott, with the consent of all other defendants, removed the first of the shareholder derivative suits, then pending in the Circuit Court of Cook County Illinois, to the United States District Court For The Northern District of Illinois, pursuant to 28 U.S.C. §1441(b), and later removed the other three suits as well. (See, Resp. App. 1)[2] Abbott asserted that the district court had original jurisdiction over the shareholder derivative suits because the plaintiffs had supposedly filed "a claim that requires resolution of a substantial issue under federal antitrust law". (See, Resp. App. 2) The defendants never asserted that any of plaintiffs' claims had been brought for violations of the federal antitrust laws pursuant to 15 U.S.C. §15, nor did defendants ever assert that plaintiffs even had a right to bring a suit for such violations. (See, Resp. App. 1-3)

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[2] References to record materials in respondents' supplemental appendix (attached hereto) are in the form "(Resp. App. ___)".

The derivative suits were consolidated in the district court. (App. 9) Plaintiffs filed a motion for remand of the cases to the state court, contending that their claims were against defendants for state-law breaches of fiduciary duty, and that none of the claims arose under the antitrust laws or any other laws of the United States. (See, App. 9) The district court denied the motion for remand, on the asserted ground that plaintiffs' claims were dependent upon substantial federal antitrust issues. (App. 10-11) The consolidated cases were thereafter dismissed on a motion in which defendants argued that plaintiffs had failed to make pre-litigation demand for Abbott's directors to take action upon the alleged breaches of the directors' and officers' fiduciary duties. (See, App. 12) Plaintiffs thereafter appealed to the Seventh Circuit Court of Appeals from the judgment of the district court. (See, App. 1-2)

On November 7, 1994, the Seventh Circuit Court of Appeals unanimously reversed the district court's decision on federal jurisdiction, holding that plaintiffs' claims did not arise under the laws of the United States, and that the district court lacked jurisdiction to hear plaintiffs' claims. (App. 1-2) The district court was directed to remand the consolidated cases to the Circuit Court of Cook County, Illinois. (App. 7)

The Seventh Circuit, in reaching this decision, relied on this Court's opinion in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 817 (1986), where this Court held that:

> . . . a complaint alleging a violation of federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for

> the violation, does not state a claim 'arising under the Constitution, laws, or treaties of the United States.'

(See, App. 4)

The Seventh Circuit noted that the conduct under scrutiny in this case was the alleged mismanagement of Abbott by the defendants. (App. 7) The Seventh Circuit, relying further on settled antitrust law, concluded that Congress had not intended claimants such as plaintiffs to have a private, federal right of action for any antitrust violations. (App. 6-7) Therefore, the Seventh Circuit held that the plaintiffs' claims for breach of fiduciary duty had not raised a substantial federal issue for purposes of determining federal-question jurisdiction. (App. 7) Since plaintiffs' claims did not arise under the laws of the United States, the district lacked original and removal jurisdiction. (App. 7)

On defendants' timely petition for rehearing *en banc*, no judges in active service requested a vote on the petition, and, on December 19, 1994, the Seventh Circuit panel unanimously denied rehearing. (App. 8)

On March 20, 1995, the petition for writ of *certiorari* to the Seventh Circuit Court of Appeals was received by this Court.

THE PETITION FOR A WRIT SHOULD BE DENIED

SUMMARY OF ARGUMENT

There is no sound reason for reviewing the decision of the Seventh Circuit Court of Appeals, and the petition for writ of *certiorari* should be denied.

A. The Seventh Circuit Properly Applied *Merrell Dow* To The Facts Of This Case, And There Is No Reason For This Court To Reconsider Its Ruling In *Merrell Dow*

Petitioners urge a review of whether this Court's 1986 decision in *Merrell Dow Pharmaceuticals, Inc. v. Thompson,* 478 U.S. 804 (1986), implicitly overruled this Court's seventy-four-year-old decision in *Smith v. Kansas City Title & Trust Co.,* 255 U.S. 180 (1921). (Pet'n. at i) This request for review should be rejected.

In 1986, this Court, in *Merrell Dow,* decided that there was no federal question jurisdiction where a complaint alleges a violation of a federal statute merely as an element in a state-law cause of action, and the federal statute provides no right of action. *Merrell Dow,* 478 U.S. at 814. In this case, the Seventh Circuit applied *Merrell Dow* and correctly determined that there was no federal-question jurisdiction over this case. This was because the federal antitrust laws (on which defendants had based removal) provided the plaintiffs with no right of action for the conduct about which they were complaining. (App. 6-7)

Petitioners do not raise, in their statement of questions presented for review, the issue of whether the Seventh Circuit's decision is inconsistent with this Court's

dispositive ruling in *Merrell Dow.* (See, Pet'n. at i) Instead, petitioners speciously argue that the Seventh Circuit's decision is inconsistent with *Smith,* and that this Court ought to reconsider the relationship between *Merrell Dow* and *Smith.* The *sub silento* basis of petitioners' argument is that this Court did not get it right in *Merrell Dow* the first time around.

Petitioners urge this Court to revisit and to reconsider its nine-year-old decision in *Merrell Dow* and its relationship to *Smith.* But, in reaching its decision in *Merrell Dow,* this Court expressly considered the impact of its prior decision in *Smith.* This Court should reject petitioners' request to waste this Court's scarce resources in retracing the course that it so recently set in *Merrell Dow.*

B. There Is No Conflict Among The Circuits Requiring A Resolution By This Court.

There is no conflict among the Circuits concerning the controlling authority of *Merrell Dow* or its application to a case such as the one presently before the Court. The First, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh and D.C. Circuits have all applied *Merrell Dow* and have rejected federal-question jurisdiction in cases where a violation of a federal statute was merely an element in a plaintiff's state-law claim.

Petitioners' contention that a conflict exists among the Circuits is no more than a reiteration that petitioners believe that there is a conflict between this Court's decisions in *Merrell Dow* and in *Smith.* However, this Court, in

Merrell Dow, expressly explained the relationship between the decision that it was rendering in *Merrell Dow* and its decision in *Smith* and determined that there was no conflict between the two decisions. No Circuit has had any difficulty in identifying *Merrell Dow* as the controlling authority over federal-question jurisdiction where a violation of a federal statute has been merely an element in a plaintiff's state law claim.

There is no conflict among the Circuits that requires resolution by this Court, and there is no reason for this Court to review the decision of the Seventh Circuit.

ARGUMENT

I.

THERE IS NO REASON FOR THIS COURT TO RECONSIDER ITS DECISION IN *MERRELL DOW*

Nine years ago, this Court held, in *Merrell Dow*, that there is no federal-question jurisdiction where a plaintiff alleges a violation of a federal statute as a mere element of a state court claim and the federal statute does not give the plaintiff a right of action. There is no reason for this Court to reconsider that decision now.

In *Merrell Dow*, the plaintiffs had filed actions in state court for negligence, alleging that children had been born with deformities as a result of their mothers' ingestion, during pregnancy, of a drug marketed by the defendant. The plaintiffs claimed that the defendant had failed to label the drug with warnings about the potential dangers of taking the drug, and so has violated the Federal Food,

Drug and Cosmetic Act (the "FDCA"). The plaintiffs claimed that the defendant's violation of the FDCA had caused the infants' birth defects. The defendant removed the cases to federal court. The district court, relying on this Court's opinion in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), held that the plaintiffs' claims, which were based upon the defendant's alleged violation of the FDCA, had arisen under federal law. *See, Merrell Dow*, 478 U.S. at 805. The Court of Appeals for the Sixth Circuit reversed, holding that there was no federal-question jurisdiction over the case. *See, Merrell Dow*, 478 U.S. at 806-807.

This Court, in *Merrell Dow*, expressly noted the district court's reliance on *Smith* and held that the plaintiffs' claims for violations of the FDCA had not arisen under federal law. *Merrell Dow*, 478 U.S. at 806. After surveying its prior decisions, this Court found that a case arises under federal law when a federal statute creates a right of action. *Merrell Dow*, 478 U.S. at 808. This Court further observed that a case may arise under "federal law where the vindication of a right under state law necessarily turned on some construction of federal law." *Id.*, at 808-809 (quoting *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9 (1983)). However, this Court cautioned that the mere presence of a federal issue to be decided as a necessary element in a state-law cause of action does not automatically confer federal-question jurisdiction. *Merrell Dow*, at 813.

Turning to the specific issue raised in *Merrell Dow*, the Court considered whether a state-law claim arose under federal law, just because the violation of a federal statute was a necessary element in the state-law claim, where Congress had not provided for a federal right of action for the injury arising from the violation of the

federal statute. In reaching its decision, the Court noted significant changes during the prior eleven years in the Court's approach to congressional silence on the provision of federal remedies. *Merrell Dow,* 478 U.S. at 811. This Court squarely held that the mere need to prove a violation of a federal statute, as a necessary element in a state-law case, did not give rise to a substantial federal issue and did not subject the case to federal-question jurisdiction. This Court concluded as follows:

> . . . the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently "substantial" to confer federal-question jurisdiction.

Merrell Dow, 478 U.S. at 814.

In *Merrell Dow,* this Court expressly considered the relationship between the decision then being rendered and this Court's decision in *Smith,* which had been rendered sixty-five years earlier. *Merrell Dow,* 478 U.S. at 814, n.12. In *Smith,* this Court had held that there was federal-question jurisdiction to decide the constitutionality of a federal statute authorizing the Federal Land Banks to issue tax exempt securities, and to decide the authority of a corporation to purchase such securities. In *Merrell Dow,* this Court considered, at length, the questions of some commentators over the viability of *Smith. Merrell Dow,* 478 U.S. at 814, n.12. This Court concluded that there was no conflict between *Smith* and other decisions of this Court, including the *Merrell Dow* decision then being decided. *Id.* This was because the nature of the federal

constitutional issue in *Smith* was qualitatively different than the nature of the federal issues in those cases where a violation of a federal statute was merely a necessary element in a state-law case. *Merrell Dow*, 478 U.S. at 814, n. 12. After all, the plaintiff in *Smith* was attacking the constitutionality of a federal statute creating and financing a federal agency, and the relief sought would have directly impaired the ability of the federal government to finance the operations of the agency.

The petitioners seek *certiorari* on what amounts to a non-issue in this case. Petitioners ask, in the abstract, whether *Smith* was implicitly overruled by *Merrell Dow*, and they query about the types of substantial federal issues that might sustain federal-question jurisdiction without an express right of action conferred by Congress. These are non-issues in this case because *Merrell Dow* expressly held that, where a federal issue appears in a complaint only as an element in a state-law claim, and Congress has given no right of action for the conduct about which the complaint is made, there simply is no federal-question jurisdiction. The Seventh Circuit correctly applied *Merrell Dow* and held that, since Congress had not given plaintiffs any right of action for the conduct under scrutiny (*i.e.*, the mismanagement of Abbott), plaintiffs' claims did not raise a substantial federal issue and did not arise under federal law.

Even if this Court were inclined to revisit the relationship between *Merrell Dow* and *Smith*, this case would be a singularly inappropriate vehicle for the task. Here, the only basis even suggested by Petitioners for federal-question jurisdiction is that, according to Abbott, a state court, on the road to deciding whether defendants

breached their fiduciary duties to Abbott, would have to decide whether defendants caused or allowed Abbott to violate the federal antitrust laws. The nature of the federal interest raised by petitioners is no greater than, and is indeed less than, the federal interest in *Merrell Dow.*

In *Merrell Dow,* the federal statute at issue (the Food, Drug and Cosmetic Act) was intended to protect the interests of the very class of persons who were bringing suit for injuries caused by the defendant's mislabeling of drugs. Yet, this Court nonetheless held, in *Merrell Dow,* that, without a right of action granted by Congress, the plaintiffs' state-law claims (premised on a violation of the FDCA) raised no substantial issue and did not arise under federal law.

In the case presently under this Court's consideration, the plaintiffs are not claiming any rights nor any remedies under the federal antitrust laws. The federal antitrust laws were designed to protect consumers and competitors. *See, e.g., Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 538-539 (1983). As the Seventh Circuit noted in this case, plaintiffs have not alleged any injury that the antitrust laws were designed to prevent or to remedy. (App. 6-7) This is because it is Abbott itself, albeit through its management, that was the perpetrator of the conduct for which the Corporation was earlier sued and for which it paid $140,000,000 in settlement amounts. (App. 7)

The central issue in this case is simply who should bear the cost of the $140,000,000 paid out by Abbott: the shareholders of Abbott or the officers and directors of the

Corporation who personally mismanaged the Corporation. Since a corporation is a creature of state law, the resolution of that issue is uniquely a matter of state law, having no federal interest. As this Court held in *Cort v. Ash*, 422 U.S. 66, 84 (1975):

> Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.

Moreover, this Court has expressly decided that Congress has provided no federal right of action to shift the costs of antitrust liability. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 642 (1981) ("Congress neither expressly nor implicitly intended to create a right to contribution" for antitrust liability). Federal law simply does not control the issue of whether petitioners in this case should be held personally accountable for their breaches of fiduciary duty to Abbott. The decision as to who should bear the loss of $140,000,000 is a matter exclusively of state law.

Any federal interest in whether the antitrust laws were actually violated by agents of Abbott is no more than a collateral matter in this case. If there was no violation of the federal antitrust laws, the defendants may still have mismanaged the Corporation by allowing it to engage in conduct that came so close to the edge of illegal or wrongful conduct that the directors agreed to pay $140,000,000 of the Corporation's money in settlements. Under Illinois law, defendants may be personally

liable for such mismanagement, *see, Shlensky v. Wrigley*, 95 Ill. App. 2d 173, 180-181, 237 N.E.2d 776, 780 (1st Dist. 1968), while federal law has nothing to say about this matter. And, assuming that a violation of federal antitrust laws needs to be proven as an element in plaintiffs' state-law case, federal law says nothing about whether the cost of such violations should be shifted from the Corporation's shareholders to the managers who personally caused the violations.

Petitioners also raise a red herring in urging that the spectre of a state-court decision on a matter of antitrust law is grounds for granting a writ of *certiorari* on the jurisdictional issues raised in the Seventh Circuit. *Merrell Dow* expressly confirmed the long-standing right of a state court to decide issues of federal law on the way to adjudicating state-law claims. *See, Merrell Dow*, 478 U.S. at 815-816.

The issue resolved by this Court in *Merrell Dow* should not be revisited by this Court every time a litigant is dissatisfied with the lower court's denial of federal-question jurisdiction in a *Merrell Dow* situation. Otherwise, this Court, with its busy docket, will be unnecessarily subjecting itself to numerous repetitive reviews of the same issue that it dispositively decided in *Merrell Dow*.

More particularly, there is no sound reason to review the decision of the Seventh Circuit in this case.

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS THAT REQUIRES A RESOLUTION BY THIS COURT

Notwithstanding petitioners' protestations to the contrary, *Merrell Dow* has served the lower courts remarkably well in resolving federal jurisdiction issues in that class of claims in which a federal issue is raised only as an element of a state-law claim. There is no conflict among the Circuits that requires a resolution by this Court.

Petitioners concede that the First, Third, Fourth, Fifth, Seventh and Ninth Circuits have all denied federal-question jurisdiction where a federal issue was raised merely as an element of a state-law claim. (Pet'n. at 18) *See, Nashoba Communications Ltd. Ptshp. No. 7 v. Town of Danvers,* 893 F.2d 435 (1st Cir. 1990); *Smith v. Industrial Valley Title Ins. Co.,* 957 F.2d 90 (3d Cir.), *cert. denied,* 112 S.Ct. 3034 (1992); *Mulcahey v. Columbia Organic Chemicals Co.,* 29 F.3d 148 (4th Cir. 1994); *Willy v. Coastal Corp.,* 855 F.2d 1160 (5th Cir. 1988); *Utley v. Varian Assocs., Inc.,* 811 F.2d 1279 (9th Cir.), *cert. denied,* 484 U.S. 824 (1987).

Petitioners omit the Tenth Circuit from their analysis and their list of Circuits that have reached the same result as the Seventh Circuit in applying *Merrell Dow.* In *Morris v. City of Hobart,* 39 F.3d 1105, 1111-1112 (10th Cir. 1994), the Tenth Circuit, after analyzing *Merrell Dow* and *Smith,* held that, since Congress had not intended to provide a federal right of action to enforce settlement agreements

made in federal civil rights suits, there was no federal-question jurisdiction over an action for enforcement of such an agreement.

Petitioners also erroneously argue that the Eleventh Circuit, in *City of Huntsville v. City of Madison*, 24 F.3d 169 (11th Cir. 1994), reached a different result than the results reached by the First, Third, Fourth, Fifth, Seventh, Ninth and Tenth Circuits. In *City of Huntsville*, the Eleventh Circuit was faced with a contract action in which the parties' respective rights turned on an interpretation of a section of the federal statute governing the Tennessee Valley Authority. The Eleventh Circuit squarely held, in agreement with *Merrell Dow* and the First, Third, Fourth, Fifth, Seventh, Ninth and Tenth Circuits, that:

> . . . in the absence of a private cause of action under the federal statute, interpretation of that statute as a necessary element of an otherwise state contract claim is not enough to permit exercise of federal question jurisdiction.

City of Huntsville, 24 F.3d at 170.

Likewise, petitioners erroneously rely on *Rogers v. Platt*, 814 F.2d 683 (D.C. Cir. 1987), in an effort to create a false illusion of a conflict among the Circuits. In *Rogers*, the D.C. Circuit was considering an appeal from a declaratory judgment of the district court, adjudicating a dispute over which of two state courts had jurisdiction to decide a custody dispute under the federal Parental Kidnapping Prevention Act. *Rogers*, 814 F.2d at 684-685. The D.C. Circuit, *sua sponte*, after analyzing *Merrell Dow* and *Smith*, concluded that Congress had not intended to grant a federal remedy under the federal statute, and that there

was no federal-question jurisdiction over the case. *Rogers*, 814 F.2d at 695-696.

Petitioners have also mischaracterized the position of the Sixth Circuit. In *Milan Express Co. v. Western Surety Co.*, 886 F.2d 783, 784 (6th Cir. 1989), the Sixth Circuit found federal-question jurisdiction in an action on a surety bond prescribed by the Interstate Commerce Commission. However, the express basis for this finding was the Sixth Circuit's determination that federal law created the cause of action on which the suit had been brought. *Milan Express*, 886 F.2d at 788-789. On this basis, the case before the Sixth Circuit was explicitly distinguished from *Merrell Dow*, and is readily distinguishable from the case presently before this Court. Indeed, in *Miller v. Norfolk & Western Ry.*, 834 F.2d 556 (6th Cir. 1987), the Sixth Circuit squarely held that "a cause of action does not create 'arising under' jurisdiction as a substantial federal question if the federal statute does not provide for a private right of action, either express or implied". *Miller*, 834 F.2d at 562.

Petitioners also find a conflict in the Second Circuit's decision in *West 14th Street Commercial Corp. v. 5 West 14th Owners Corp.*, 815 F.2d 188 (2d Cir.), *cert. denied*, 484 U.S. 850 (1987), which was decided shortly after this Court's decision in *Merrell Dow* had been rendered. However, the decision in *West 14th Street* on the *Merrell Dow* issue was an alternative holding, made after a determination that the federal statute at issue conferred an express right of action. *See, West 14th Street*, 815 F.2d 193-194, 196. The limited precedential value of the Second Circuit's alternative holding in *West 14th Street* was subsequently noted by the Fourth Circuit in *Clark v. Velsicol Chemical Corp.*,

944 F.2d 196, 198-199 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 1173 (1992).

The other case on which petitioners rely, *Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc.*, 986 F.2d 476 (Fed. Cir. 1993), was a patent case, which involved federal patent issues and was decided under the special statute allowing for federal jurisdiction in patent cases, and not under 28 U.S.C. § 1331. In that case, the Federal Circuit did not rely upon, discuss, nor even cite *Merrell Dow*.

Petitioners erroneously rely on their presentation of a false conflict among the Circuits to urge that the case presently under consideration presents an important issue for resolution by this Court. As shown above, the lower courts are not in disagreement over the application of *Merrell Dow*, and there is no crisis in the determination of federal jurisdiction in the district courts. The supposed conflict among the Circuits and the supposed importance of the issue raised in the petition in this case are wholly illusory.

CONCLUSION

For the above and foregoing reasons, the petition for writ of *certiorari* to the Seventh Circuit Court of Appeals should be denied.

Respectfully submitted,

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RESPONDENTS' APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

F. DAVID SEINFELD, LEATRICE SEINFELD and FREDERICK SEINFELD, Plaintiffs, -against- K. FRANK AUSTEN, DUANE L. BURNHAM, H. LAURANCE FULLER, SIR BERNARD HAYHOE, THOMAS R. HODGSON, DAVID A. JONES, BOONE POWELL, JR., ADDISON BARRY RAND, W. ANN REYNOLDS, WILLIAM D. SMITHBURG, JOHN R. WALTER, WILLIAM L. WEISS, Defendants, -and- ABBOTT LABORATORIES, Nominal Defendant.	)	No. 93C 3788

NOTICE OF REMOVAL

To the honorable judges of the United States District Court for the Northern District of Illinois, Eastern Division:

Removing party Abbott Laboratories respectfully shows this Court:

1. Abbott Laboratories is a defendant in the above-captioned action.

2. On May 26, 1993, this action was commenced in the Circuit Court of Cook County, Illinois, Chancery Division, and is now pending therein. (A copy of the complaint is attached hereto as Exhibit A.) Abbott was served with a copy of the complaint and summons in this action on June 2, 1993.

3. No other pleadings have been filed and no further proceedings have occurred in this action in the Circuit Court of Cook County.

4. This action purports to assert a derivative claim against certain directors of Abbott alleging that Abbott has engaged in price fixing activities in violation of federal and state antitrust laws and that the defendant directors permitted or fostered such alleged illegal conduct by Abbott. In support of this claim, the complaint specifically refers, *inter alia,* to consolidated actions in the United States District Court for the Northern District of Florida and an action filed by the Federal Trade Commission in the United States District Court for the District of Columbia, which have alleged price fixing and bid-rigging claims against Abbott under the federal antitrust laws.

5. This Court has original jurisdiction over the above-captioned action under 28 U.S.C. § 1331, and the action is therefore removable pursuant to 28 U.S.C. § 1441(a), because plaintiffs' complaint asserts a claim that requires resolution of a substantial issue under federal antitrust law, 15 U.S.C. §§ 1 et seq. *See, e.g., Cannon v. Loyola University of Chicago,* 609 F. Supp. 1010, 1014 (N.D.

Ill. 1985); *Local 921 v. Estate of Schmidt*, 684 F. Supp. 601, 605 (W.D. Wis. 1988).

6. This notice is filed within 30 days after receipt by Abbott through service or otherwise of the initial pleading setting forth the claims for relief upon which this action is based.

WHEREFORE, Abbott hereby removes the above-captioned action from the Circuit Court of Cook County, Illinois to this Court.

Respectfully submitted:

/s/ Robert J. Kopecky
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Nominal Defendant Abbott
Laboratories

Dated: June 24, 1993